Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-750

RONALD F. CALVERT,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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RONALD F. CALVERT,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Ronald F. Calvert, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on August 25, 1975.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on August 25, 1975, in an opinion which has not yet been officially reported. (Excerpts

appear at 17 Cr.L. 2493). The opinion is reproduced as Appendix A hereto.

On September 24, 1975, the Court of Appeals denied petitioner's petition for rehearing and suggestion of appropriateness of rehearing in banc. (See Appendix C.) No opinion was written, and the order has not been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 25, 1975. (See Appendix B.) A timely petition for rehearing with suggestion of appropriateness of rehearing in banc was denied on September 24, 1975. (See Appendix C.)

On October 15, 1975, Mr. Justice Blackmun extended the time within which to file a petition for writ of certiorari to November 24, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether the grand jury and other proceedings in this case were improper because of invalid authorizations to special attorneys of the Department of Justice.

II

Whether, in the light of *Brady v. Maryland*, 373 U.S. 83 (1962), and *Giglio v. United States*, 405 U.S. 150 (1972), the

government's misrepresentation as to inducements monetary subsistence payments to a key government witness deprived petitioner of a fair trial.

III

Whether, in the light of *United States v. Maze*, 414 U.S. 395 (1974), the government failed to make a submissible mail and wire fraud case, and whether the Court properly instructed the jury.

IV

Whether evidence of alleged prior crimes and activities of petitioner was properly admitted.

V

Whether hearsay state of mind evidence was properly admitted.

VI

Whether massive publicity deprived petitioner of a fair trial.

VII

Whether petitioner's sentence was improperly imposed and constitutionally excessive.

STATUTES AND RULES INVOLVED

Statutes of the United States

Title 18, United States Code.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by

means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 28, United States Code.

§ 515. Authority for legal proceedings; commission, oath, and special attorneys.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

Federal Rules of Criminal Procedure

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(b) The motion raising defenses and objections.

(2) Defenses and objections which must be raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Federal Rules of Evidence

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) Then existing mental, emotional, or physical condition.— A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not

including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

STATEMENT

Petitioner was convicted on all counts of a twelve-count indictment (R. 1-17)[1] charging him with seven violations of the mail fraud statute (18 U.S.C. 1341), four violations of the fraud by wire statute (18 U.S.C. § 1343), and one count of conspiracy (18 U.S.C. § 371).

The indictment charged that the two defendants, petitioner Ronald F. Calvert and his father James Henry Calvert, conspired and committed substantive offenses arising out of a scheme to defraud three insurance companies, The Prudential Insurance Company of America, New England Mutual Life Insurance Company, and Underwriter's at Lloyds, London (Lloyds of London). The basic details of the alleged scheme were that the defendants would cause insurance to be placed on the life of Victor Null, an inventor, and as part of the scheme would collect the insurance proceeds after presumably arranging for the death of Null. The substantive counts related to various documents mailed or sent by telegram to or from the various insurance companies involved and one interstate telephone call.

On August 12, 1974, trial commenced against petitioner only. (A severance was granted to his father because of illness.) The trial lasted for approximately 5 weeks, and after the jury deliberated on two separate days, they returned a verdict on September

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[1] "R." refers to the Record on Appeal filed in the Court of Appeals and certified to this Court. "Tr." refers to the nine-volume transcript of trial proceedings. In addition, there were separate typed transcripts of trial testimony of witnesses John Alsop, Charles Hintz and Shirley Null which are referred to herein by the name of the witness.

12, 1974, finding petitioner guilty as charged in all twelve counts. During the trial petitioner was free on bail, but immediately upon the return of the verdict, he was remanded to the custody of the Marshal and has remained in custody ever since, being presently confined at the United States Penitentiary at Leavenworth, Kansas. Release pending appeal was denied by Mr. Justice Blackmun on November 12, 1974.

The two main witnesses against petitioner were Charles Hintz and John Alsop. There was a sharp conflict between their testimony and that of petitioner, who testified in his own behalf. There was no great dispute between the testimony of most other witnesses, who were primarily insurance company and bank employees. During the five weeks of trial, 49 witnesses testified for the prosecution (one in rebuttal), and 16 witnesses, including petitioner, testified for the defense. The evidence necessary for an understanding of the factual background of this case and relevant to the questions presented herein was as follows:

Victor G. Null had invented a revolutionary type of rotary engine. He had secured American patents and was in the process of obtaining foreign patents (Tr. 616-624). His expectations were high and he thought his engine was superior to the Wankel engine for which General Motors had paid $50,000,000.00 (Tr. 1223-1224; Deft. Exh. A), but Null lacked financing to produce a working model and to develop and market the engine.

In the meantime, petitioner Ronald Calvert was looking for an investment for his father, James Henry Calvert, who was retired and needed something to do. Petitioner considered a number of investments and, through a product development agency, became acquainted with Null (Tr. 37-48, 1779-1780). They discussed a partnership, and on May 25, 1972, the V.G.N. Engineering Company (VGN), a partnership, was formed between Calvert Sr. and Null (Govt. Exh. 34).

Petitioner handled all of the discussions, negotiations and transactions for his father. In the course of the conversations, they discussed insurance to provide protection for the father's investment. Accordingly, about the time of the creation of VGN, an application was made on May 22 to Prudential for $500,000.00 insurance on the life of Null, with Calvert Sr. as beneficiary (Govt. Exh. 1). Calvert Sr. paid the premium of $10,480.00 (Govt. Exh. 4). This application was processed by Agent Leveridge of St. Louis, and correspondence was mailed to the Prudential home office in Houston, Texas, including a medical report (Count 1—Govt. Exh. 1B and 1C) and a letter of Leveridge (Count 2—Govt. Exh. 6). Around July 5, the application for $500,000.00 insurance was not approved (Tr. 133).

Through Leveridge, an application was submitted to New England on July 7, (Tr. 134, Govt. Exh. 19). Ultimately $350,000.00 in insurance was issued by New England, including accidental death benefits (Govt. Exhs. 20, 21, 22, 23, 25, 26), with Null as the insured and Calvert Sr. as the beneficiary. In connection with the New England policies, there was correspondence between St. Louis and Boston, the home office, including a letter from Comfort, the New England agent in St. Louis, to Boston on July 10 (Count 3—Govt. Exh. 20), a mailgram from Boston to St. Louis on July 19 (Count 4—Govt. Exh. 21), a letter from Comfort to Boston on July 24 (Count 5—Govt. Exh. 23), and a memo from St. Louis to Boston around September 5 (Count 6—Govt. Exhs. 24, 33; Tr. 403, 598-599). The full first year's commission payable on the New England policies was actually delivered by a New England agent to Prudential agents because they were considered the source of the business (Tr. 1717-1723).

In the meantime Null and petitioner, still acting in behalf of his father, were discussing the development of the engine, and they concluded that additional specialized personnel were

needed to handle accounting, legal and marketing affairs. It was decided to give a small percentage of the partnership to qualified individuals rather than paying them for services. Null desired to retain 50% control, and therefore 7% for the additional participants came out of the original 50% share of Calvert Sr. A new partnership agreement (Govt. Exh. 118) for HCS Turbine Company (HCS) was executed on July 24, 1972, and reflected Null's 50%, Calvert Sr.'s 43% and 7% divided among C.P.A. Shelton, Attorney Gaertner, Walsh and McCoole (Tr. 1141-1152). At all of the meetings prior and subsequent to the creation of this partnership, petitioner attended in behalf of his father and actively participated in discussions and decisions.

The HCS partnership agreement (para. 13) contemplated the purchase of life or disability insurance on partners. A separate agreement was also signed by the HCS partners that they had no interest in the New England insurance, but that it belonged to Calvert Sr. (Tr. 1162-1163, Govt. Exh. 119).

In order to move forward with the building and development of the engine, Null drew plans, and a tool and machine company built a working model and plastic model (Tr. 1325-1326). An office of HCS was located and established in East St. Louis, Illinois, the location having been chosen because of its low rent, adequate parking and proximity to numerous suppliers needed by Null in the development of a working model (Tr. 1588, Govt. Exhs. 35, 86).

At the end of August, petitioner contacted the St. Louis representative of Lloyds who in turn contacted the London office, and within about 10 days an accident policy for $2,000,000.00 on Null was approved by Lloyds (Govt. Exh. 76-A; Tr. 926-944, 947-957). No investigation by Retail Credit Corporation, similar to their investigations for Prudential and New England, was made; Lloyds relied only upon the appli-

cation and information furnished by petitioner (Tr. 956). In connection with the Lloyds policy, correspondence included a letter from the St. Louis manager to London on September 1 (Count 7—Govt. Exhs. 69, 123), a letter to Gaertner on September 8 (Count 8—Govt. Exh. 71), a teletype from St. Louis to London on September 11 (Count 9—Govt. Exh. 72), and one in reply on September 13 from London (Count 10—Govt. Exh. 73).

On November 9, 1972, Null's body was found in the East St. Louis office (Tr. 1455). He had been shot and murdered. (To this date, the murderers have not been apprehended.)

The foregoing facts were not seriously disputed at the trial; for the most part they were established or corroborated by documents. There was other evidence, however, on which government witnesses and petitioner conflicted, primarily over prosecution efforts to prove that petitioner intended and attempted to cause Null's death.

Hintz, one of the two crucial government witnesses, testified that he had been acquainted with petitioner for many years and saw him again in the fall of 1971. Several months later petitioner showed him a check for $300,000.00 representing proceeds of sale of a business, and Hintz expressed interest in investing in a business (Hintz Tr. 4-5, 7-10). Later petitioner told Hintz that he was seeking inventors so that he could insure them and collect on the insurance. Petitioner suggested that Hintz make the insurance application and then explained how they would divide the proceeds (Hintz Tr. 13-22). Hintz and petitioner investigated several potential businesses, but nothing materialized (Hintz Tr. 24-44). Because of petitioner's interest in purchasing some equipment, Hintz put him in contact with Alsop in 1972 (Hintz Tr. 45-46). After the death of Null, petitioner told Hintz to tell Alsop not to talk and threatened Alsop's daughter. Petitioner also

said that he had concocted a story that Hintz wanted to buy rights to the Null engine (Hintz Tr. 49-52).

Petitioner contradicted Hintz and testified that Hintz was interested in business ventures and brought several to petitioner, but nothing materialized (Tr. 1799-1825). He denied the insurance conversations (Tr. 1811). Petitioner also testified that Hintz wanted to buy rights to the Null engine, but his offer was rejected (Tr. 1825-1830). After Null's death, Hintz told petitioner that Alsop wanted money from petitioner or he would say he was approached to kill Null, but Hintz could control Alsop if petitioner would arrange for Hintz to get the engine (Tr. 1831-1835). Petitioner denied any threats to Alsop's daughter (Tr. 1836).

Alsop, the other crucial government witness, testified that he saw petitioner and Hintz in summer 1972 and they discussed the purchase by petitioner of a piece of equipment and that Alsop knew someone who could be helpful in a rezoning (Tr. 151-152). On November 1, petitioner came to the Alsop house and offered him $5,000.00 to kill an inventor (Tr. 154-162). The next day, petitioner called and offered more money (Tr. 164-166). (This call was the basis of Count 11 of the indictment.) After Null's death, petitioner again visited Alsop and said he was not concerned about the investigation of the Null killing, and then petitioner talked about zoning problems (Tr. 166-169).

Petitioner testified that he saw Alsop in April 1972 concerning a high lift and then they talked about zoning (Tr. 1843-1847). Around November 1, he saw Alsop but only as to zoning (Tr. 1847-1849). He called him the next day, but Alsop was not home (Tr. 1850). Petitioner contacted Alsop again several times for the name of a lawyer who could handle the zoning problem, and Alsop finally gave it to him (Tr. 1850-1854). Petitioner denied that he had ever discussed with Alsop any

killing of Null and never mentioned Null's name to Alsop (Tr. 1851).

At the close of all the evidence, the Court overruled petitioner's motion for judgment of acquittal (Tr. 2037). The cause was submitted to the jury after argument (Tr. 2076-2181), and the Court's charge to the jury (Tr. 2181-2215), to which petitioner made certain objections (Tr. 2065-2072). The jury returned a verdict finding petitioner guilty on each count (Tr. 2220-2221). Petitioner was immediately remanded to the custody of the Marshal (Tr. 2225).

The Court sentenced petitioner to 5 years imprisonment on each count, but the sentences on several counts were to run concurrently, so that the total time to which petitioner was sentenced was 45 years (Tr. 2230-2234). A tabulation of the sentences appears as Appendix D to this brief.

Petitioner duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit. On August 25, 1975, a panel of the Court of Appeals filed an opinion (Appendix A) affirming petitioner's conviction. Petitioner's timely petition for rehearing and suggestion of appropriateness of rehearing in banc was denied on September 24, 1975. (See Appendix C.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I

Authority of Special Attorneys.

In the fall of 1974, as a result of an opinion in *United States v. Williams*, No. 74 CR 47-W-1, by the Honorable John W. Oliver, United States District Judge for the Western District of Missouri, an issue affecting the administration of criminal justice came to light. Judge Oliver ruled that special attorneys of the Department of Justice, operating under very broad letters of appointment, were not properly appointed pursuant to 28 U.S.C. § 515 and that their appearance before grand juries was improper; the grand jury proceedings being tainted, he ordered an indictment dismissed. Thereafter this issue was raised in numerous cases, and decisions by District Courts have been in hopeless conflict. (The government appealed in the *Williams* case, but thereafter dismissed its appeal. See No. 75-1034 in the Eighth Circuit Court of Appeals.)

When this issue became known, petitioner had already been convicted herein and had appealed to the Court of Appeals. At his request, the cause was remanded by the Court of Appeals to the District Court for a hearing on this issue. The District Court was presented with letters of authority of special attorneys who had participated in this case, and, after a hearing, the trial Court overruled petitioner's motion on the merits. The cause was then returned to the Court of Appeals which ruled adversely to petitioner.

The Court of Appeals decided that the objection was waived because not presented before trial, citing Rule 12(b)(2) of the Federal Rules of Criminal Procedure, and *Davis v. United States*, 411 U.S. 233 (1973). We believe the Court was in error in suggesting a waiver, because Rule 12(b)(2) recognizes that

"the court for cause shown may grant relief from the waiver"; here there was good cause for such relief because the issue had not become known until after the conviction. Cf. *Rollerson v. United States*, 405 F. 2d 1078, 1081 (D.C. Cir. 1968), judgment vacated, 394 U.S. 575 (1969), where the Court of Appeals was sensitive to "a supervening change in the law which creates a more favorable climate for the point."

Davis v. United States does not justify a bar to the consideration of this issue; a careful reading sanctions relief from waiver under the particular circumstances of this case, where the issue was raised as soon as it became apparent, and petitioner did not wait until completion of all appellate proceedings. Compare *Fernandez v. Meier*, 408 F. 2d 974 (9th Cir. 1969), *Kaufman v. United States*, 394 U.S. 217 (1969), and *Fay v. Noia*, 372 U.S. 391 (1963). There has certainly been no deliberate by-pass or intentional disregard or waiver of the issue by petitioner herein.

Finally, and perhaps most significant on the waiver point is the fact that the District Court here, upon remand of the cause, considered this issue on its merits. He did not deny relief to petitioner because of any waiver or failure to show cause. Note that in *Davis* this Court pointed out that the District Court had specifically made a finding that there was no showing of cause to justify relief from the waiver. Here the government raised the waiver issue in its pleadings in the District Court, but the District Judge did not base his judgment on any waiver; instead he went to the merits and decided the issue adversely to petitioner. Thus, the Court of Appeals was in error in suggesting that there was a waiver.

* * * * * * *

On the merits, the Eighth Circuit has ruled on this issue in several cases mentioned in its opinion—*United States v. Wrigley*, 520 F. 2d 362 (8th Cir. 1975), *United States v. Agrusa*, 520

F. 2d 370 (8th Cir. 1975), and *DiGirlomo v. United States*, 520 F. 2d 372 (8th Cir. 1975). See also *United States v. Burnett*, 520 F. 2d 1373 (8th Cir. 1975), and a decision of the Second Circuit, *In re Persico*, — F. 2d — (No. 75-2030, June 19, 1975). We understand that petitions for certiorari have been filed by Wrigley, DiGirlomo and Burnett.

We will not lengthen this petition by extended argument on this Question, except to suggest that it is a substantial issue requiring determination by this Court. (See *United States v. Crispino*, 392 F. Supp. 764 (S.D.N.Y. 1975), and the historical analysis in *In re Persico*.) We join the reasons given in other petitions presenting the same issue. We respectfully submit that this Court should cause a thorough review of the entire procedure in the Department of Justice for the authorization and utilization of special attorneys.

Among the variety of improprieties are the following: Letters of authorization have been signed by unauthorized people;[2] the letters of authorization are much too broad and lack the specificity required by § 515; the letters and the oaths of office frequently do not include authorization to investigate cases involving statutes in which the special attorneys are acting.[3] It has also come to light recently that special attorneys are being given simultaneous letters of authorization for a multitude of districts, indicating that there is an indiscriminate practice of

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[2] In two instances in the United States District Court for the Eastern District of Missouri, cases were dismissed and new indictments had to be obtained because letters of authorization were admittedly signed in December 1974 by a secretary to the Deputy Attorney General, seven months after this Court's decisions in *United States v. Giordano*, 416 U.S. 505 (1974), and *United States v. Chavez*, 416 U.S. 562 (1974). See *United States v. Ballard*, No. 74-317 CR (4), and *United States v. Gryder*, No. 74-331 CR (3).

[3] As an example, the letters of authorization and oaths of office of the two trial attorneys in this case did not refer to cases involving 18 U.S.C. § 371, 1341 and 1343.

authorizations which could be extended throughout the entire country.

We respectfully suggest that it would be appropriate for this Court to order the Department of Justice to make full disclosure of their procedures for authorizing special attorneys to appear in District Courts throughout the country. It should be done now so that hundreds of dismissals could be avoided, as resulted from this Court's decisions in *United States v. Giordano* and *United States v. Chavez*.

Because of the conflict which exists among various lower courts and because of the importance of this issue in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

II

Inducements to Government Witnesses.

Hintz and Mr. and Mrs. Alsop were crucial government witnesses; without their testimony, there would have been no case. Thus, it was important to petitioner to attempt to destroy their credibility, and one method of doing so was to ferret out the reasons and inducements for their testimony.

Prior to their testimony, petitioner requested the government to advise him of all promises, immunity, inducements or other benefits given to the witness. The government's response was merely that there were no promises or inducements except protection (Tr. 483-484, Alsop Tr. 176-177). That such promises, inducements and benefits which were extended by the government should have been disclosed is hardly subject to question in the light of *Napue v. Illinois*, 360 U.S. 264 (1959), *Brady v. Maryland*, 373 U.S. 83 (1962), and *Giglio v. United States*,

405 U.S. 150 (1972). See also *DeMarco v. United States*, 415 U.S. 449 (1974).

The exact representation by the prosecutor was: "He has had no promises of immunity and the only other promises we've made him is that Ronnie Calvert or any of his friends won't be able to kill him if we can prevent it." To the Court's question as to whether any other benefits had been given to him, government counsel stated: "Other than the normal benefits associated with witness protection." (Tr. 484). In the context of this representation by the prosecutor, defense counsel justifiably assumed that the only benefits given to Hintz was the protection of a United States marshal. Nothing was said (instead it was concealed from defense counsel and the trial Court) that Hintz was being paid; the implication of government counsel was that he was not being paid.

Upon such representations, the defense did not explore this issue on cross-examination of Hintz. It was not until the testimony of Mr. Alsop that petitioner became aware of, and, with great difficulty, was able to develop some evidence concerning such inducements. Alsop finally acknowledged that he was being paid by the government (Alsop Tr. 194-197), in direct contradiction of the prosecutor's denial of any such inducements.

The prosecutor never did reveal the payments to Hintz during the trial. *The first acknowledgment by the government of the Hintz subsistence payments finally appeared in its brief in the Court of Appeals!*

Such misrepresentation by the government prosecutor and his failure to disclose such crucial evidence were contrary to *Napue*, *Brady* and *Giglio*, and the many cases which have followed them. See, for example, *United States v. Harris*, 462 F. 2d 1033 (10th Cir. 1972); *United States v. Mele*, 462 F. 2d

918 (2nd Cir. 1972); *United States v. Kaplan*, 470 F. 2d 100 (7th Cir. 1972); *United States v. Tashman*, 478 F.2d 129 (5th Cir. 1973); *Taylor v. United States*, 487 F. 2d 307 (2nd Cir. 1972); *United States v. Gerard*, 491 F. 2d 1300 (9th Cir. 1972), and *Teague v. United States*, 499 F. 2d 1381 (7th Cir. 1974).[4] See also *United States v. Butler*, — F. 2d — (9th Cir. No. 74-2201, decided December 18, 1974), for a discussion of non-disclosure and obligations of prosecutors to disclose benefits to witnesses. And for a case holding it to be reversible error to limit the defense in discovery of the full extent of subsistence benefits paid to a key government witness, see *United States v. Partin*, 493 F. 2d 750, 757-760 (5th Cir. 1974).

It is true, as the opinion of the Court of Appeals says here, that defense counsel did not probe the area of promises and benefits in cross-examining Hintz. But there was no reason to probe that area in view of the assurances and representations by government counsel to the Court and defense counsel that there had been no benefits or payments. The fact that Alsop acknowledged receiving payments[5] gave no indication that Hintz was receiving similar relocation payments, especially in the light of the assurance by government counsel to the contrary. Even after Alsop admitted it, there was still no reason for Hintz to be recalled for further cross-examination in an area where government counsel had already represented to the Court and defense counsel that such cross-examination would be fruitless.

The Court of Appeals says that petitioner suffered no prejudice because defense counsel was permitted to theorize in clos-

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[4] The Eighth Circuit itself is in conflict, for another panel has reached the opposite result in *United States v. Librach*, 520 F. 2d 550 (8th Cir. 1975).

[5] It was asked on cross-examination of Alsop after he had mentioned the payments to defense counsel in an interview prior to his testimony.

ing argument that the government must have been paying Hintz. Such speculation could not overcome the prejudicial error created by the government's deliberate concealment of crucial facts, especially in view of the Court's instructions to the jury that closing arguments "are not evidence" (Tr. 2183).

This petition presents a deliberate, calculated and successful effort by government counsel to conceal the fact of substantial relocation payments made to crucial witnesses, contrary to decisions of this Court. Because of this clear conflict, we respectfully suggest that certiorari should be granted as to this Question. (On the facts of this case, we further suggest that summary per curiam reversal would be appropriate.)

III

Submissible Case (Instruction).

The government's theory in this case apparently was that petitioner used the mails in a scheme to procure insurance on the life of Mr. Null while he had the intent to cause the death of Null. We believe that under this Court's decision in *United States v. Maze*, 414 U.S. 395 (1974), there was no use of the mails for the purpose of executing the scheme, and therefore the conviction cannot stand. The same question articulated in *Maze* exists in the instant case: "But the more difficult question is whether these mailings were sufficiently closely related to [petitioner's] scheme so as to bring his conduct within the statute."

The mailings here were only incidental to any scheme which may have existed. Assuming petitioner had the guilty intent and wanted to obtain insurance with the intent that Null subsequently would be murdered, the correspondence between representatives of the insurance companies had nothing to do

with the carrying into effect of such a scheme. It certainly made no difference to the success or failure of the scheme whether the mails were used.

Maze, as well as two earlier cases, *Kann v. United States*, 323 U.S. 88 (1944), and *Parr v. United States*, 363 U.S. 370 (1960), clearly show that the Court of Appeals is in error in deciding that this was a proper mail fraud prosecution. There was no use of the mails for the purpose of executing a scheme, nor was there sufficient connection between the mailings and the execution of the scheme. Under these circumstances, no offense was committed.

Although this Court sought to limit the broad and unintended use of mail fraud statutes (see footnote 10 of *Maze*), courts are nevertheless disregarding the doctrine of this Court and are applying Sections 1341 and 1343 to factual situations never contemplated by the mail and wire fraud statutes. Certainly Congress had no intention to apply the statutes to a case basically involving a complaint of murder. If petitioner was guilty of murder, he should have been tried for that offense, but not under Sections 1341 and 1343. We respectfully suggest that it would be appropriate for this Court to check this unwarranted extension of the fraud statutes by further delineating their standards of applicability.

But even if there could arguably have been a mail fraud offense and a jury question of whether the mailings had sufficient relationship to the scheme, then at the very least the trial Court should have given Defendant's Instruction No. 12A:

> "The Court instructs the jury that, in order to constitute an offense against the laws of the United States, the use of the mails or wire facilities must be for the purpose of executing a scheme or artifice to defraud. It is not sufficient merely that the use of the mails or wire facilities occurred. There must be a connection between the

use of the mails or wire facilities and the execution of the scheme, and the use of the mails or wire facilities must be an essential part of the alleged scheme. Furthermore, the defendant must have contemplated the use of the mails or wire facilities.

Therefore, unless you find and believe beyond a reasonable doubt that the use of the mails and wire facilities was an essential part of a scheme or artifice to defraud, if you find that such a scheme or artifice existed, and that without such use of the mails or wire facilities, the alleged scheme could not have succeeded, and that the defendant specifically contemplated that the mails or wire facilities would be used and that such use should be an essential part of such alleged scheme or artifice, then you must find the defendant not guilty."

If there was a submissible case, this instruction was a proper statement of the *Maze* law and was not covered elsewhere.

Because of the conflict of the opinion of the Court of Appeals with the decisions of this Court, and because of the need for further clarity in the application of the mail and wire fraud statutes, we respectfully suggest that certiorari should be granted as to this Question.

IV

Other Crimes and Activities.

In their attempt to prove petitioner's participation in a scheme to defraud insurance companies by obtaining insurance on Null's life and then causing his death, the prosecution offered evidence of prior activities of petitioner. Among them were negotiations with Held (Tr. 646), Baker (Tr. 697), Hintz (Tr. 27), and Mrs. Beck (Tr. 720, Hintz Tr. 34) concerning prior

investigations by petitioner of prospective business ventures. There was also brief testimony referring to the 1969 wounding of a former employer of petitioner, Schucardt, with petitioner being beneficiary of an insurance policy on his life. Schucardt was not called as a witness, despite the prosecutor's assurance when the testimony first appeared that he would be a witness (Tr. 1265-1266).

All of this testimony of prior activities, with implications of criminal aspects, should not have been admitted. But the most flagrant violation of the rules of evidence was the admission of that pertaining to the accidental killing of Edwards, a former partner of petitioner in a business unrelated to Null. Edwards was killed in 1970 by accidental gunshot fired by Donald Deal; petitioner and another surviving partner collected nearly $300,-000.00 each on insurance on Edwards' life. Walsh, a partner in HCS, was permitted to testify that petitioner had explained his involvement in the matter to the HCS partners (Tr. 1264). Mrs. Edwards testified concerning her husband's death (Tr. 745, 890), and police officers testified (Tr. 831, 848) as to the circumstances of the killing which took place two and one-half years prior to the Null killing. Court records concerning settlement of the insurance claims were also introduced (Tr. 807). Petitioner was never even arrested for the killing of Edwards, and the insurance companies paid the full amount of the policies (Tr. 817).

Each of these transactions was completely unrelated to the Null insurance and killing. The Schucardt and Edwards matters took place several years prior to petitioner's dealings with Null. The others occurred prior to his meeting Null when he was looking for an investment for his father. Petitioner found himself in the position of defending, without forewarning, against numerous other transactions and suggested crimes not alleged in the indictment. (It was a stroke of luck and quite by accident that petitioner was able, during the lengthy trial, to develop the

bad credit standing of Mr. Baker (Tr. 1615). Obviously petitioner was not aware of it at the time of cross-examination.) The "red herring" of Schucardt was mentioned but never further developed.

As to Edwards, the prosecution did not alert petitioner in advance of the issue of the unreasonable search and seizure of the shotgun shell (Govt. Exh. 83, Tr. 858). Petitioner was suddenly required to defend against an uncharged and unrelated murder accusation. There was no justification for the prosecutor to be waving the shotgun used in the accidental killing of Edwards (Govt. Exh. 80, Tr. 850). Consider the psychological impact upon the jury of the deadly shotgun which killed Edwards (not Null and not by petitioner), especially in the absence of any weapon related to the Null killing. The danger and prejudice in permitting a trial to degenerate into tangential factual issues of other transactions was never more apparent than in the instant case.

The Court of Appeals approved the admission of all this evidence of other acts and possible crimes, under the authority of Rule 404(b) of the Federal Rules of Evidence.[6] In its longest section, the opinion analyzes the new Rule and discusses its application, but the Court of Appeals acknowledges the difficulties created by the Rule and the differences of opinions concerning this most troublesome area of the law of evidence. (See footnote 10 and 11 of opinion below.)

Weinstein, in his recently published treatise on the new Rules of Evidence also recognizes the conflict in opinions (para. 404 [08], pp. 404-40):

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[6] The new Rules of Evidence became effective after the trial and Court of Appeals opinion. Cf. *United States v. Nobles*, — U.S. —, 95 S.Ct. 2160, 2167 (1975), where this Court said in footnote 6:

> "As the Federal Rules of Evidence were not in effect at the time of respondent's trial, we have no occasion to consider them or their applicability to the situation here presented."

> ". . . the question of when evidence of a particular criminal act may be admitted is so perplexing that the cases sometimes seem as numerous 'as the sands of the sea,' and often cannot be reconciled."

Further, at para. 404[09], pp. 404-57, there is a discussion of the plan or design theory of admissibility:

> "Most troublesome are cases which admit proof of other crimes as evidencing a plan or design from which it can be inferred that defendant committed the crime in question. Courts use the plan or design label in a variety of somewhat overlapping situations."

The conflict among the authorities over the admissibility of evidence of other activities and crimes has not been resolved by Rule 404(b). It would be appropriate for this Court now to delineate guidelines for the application of the new Rule, thereby avoiding many trial problems and potential appeals.

Because of the importance of a resolution of this issue to the administration of criminal justice, and to avoid conflicts among lower courts and obviate numerous appeals, we respectfully suggest that certiorari should be granted as to this Question.

V

Hearsay State of Mind and Intentions of Mr. and Mrs. Null.

Mrs. Null was permitted to testify as to conversations with her husband in the privacy of their home shortly before his death. Over objection, she testified to conversations expressing their joint fears, his intentions and their respective states of mind. Among her testimony was the following: (1) that they were fearful over the location of the office in East St. Louis (Null Tr. 11); (2) that her husband intended to move the office (Null

Tr. 9-10), to cancel the insurance (Null Tr. 12-13), and to talk to Shelton and petitioner about cancelling the insurance and terminating the partnership (Null Tr. 13, 15), although later she said that he was just going to talk to Shelton (Null Tr. 18); (3) that she wanted him to get out of the HCS partnership and he said he intended to because they were frightened of the insurance (Null Tr. 14, 17); and (4) that when he got out of the partnership he was going to build another engine which was then in his head (Null Tr. 16). She indicated that these discussions occurred within a short period of time prior to his death and that she kept insisting that he take care of these matters and he said he would. The implication of all of this uncorroborated testimony was that Null's fears, intentions and state of mind were expressed to petitioner and thus provided him with a motive to cause Null's immediate murder. (It is interesting to note that when the prosecutor earlier attempted to obtain the same type of evidence from Mrs. Edwards, the Court sustained the defense objections (Tr. 891-893).)

This self-serving hearsay testimony of Mrs. Null was highly inflammatory and prejudicial to petitioner. There was no way for petitioner to rebut it except to attempt to prove that she had ulterior and financial motives for fabricating. Such cross-examination could and probably did have a harmful effect upon the jury, which would brand the defense as being insensitive to the feelings of the recently bereaved widow. To permit such testimony encourages perjury, for there is no means by which it can be contradicted. It was to prevent such problems that the hearsay rule was adopted; it should not now be abandoned by recognizing a new and dangerous exception.

The Court of Appeals here relied on *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), to approve the admission of this testimony, also citing Federal Rules of Evidence 803(3). *Hillmon* has, of course, generated considerable discussion and controversy (see Weinstein's Evidence, para. 803(3)[04] and

[05]); we believe that its application here to the testimony by Mrs. Null of the states of mind of herself and her husband was erroneous. Compare *People v. Ireland*, 70 C. 2d 522, 75 Cal. Rptr. 188, 450 P. 2d 580 (1969), where state of mind evidence was determined to be inadmissible under a state statute similar to Rule 803(3). Also the case of *United States v. Brown*, 490 F. 2d 758 (D.C. Cir. 1974), although lengthy, is well worth reading for its full discussion of all of the principles applicable to state of mind evidence. (In the instant case, no limiting instruction was given.)

In view of the decisions and comment since *Hillmon* and the recent adoption of Rule 803(3), we believe that this case presents an opportunity for this Court to review and clarify the law with reference to "state of mind" evidence. Future controversy and appeals may be avoided if guidelines can be developed. For these reasons, we respectfully suggest that certiorari should be granted as to this Question.

VI

Publicity

Null's murder in November, 1972, was reported in detail at the time, but had been discontinued long before petitioner's indictment. Suddenly in March, 1974, on the day before the indictment was voted, radio and television reported that an indictment was imminent (4/19 Tr. 3). Petitioner sought to determine the source of these reports at the hearings on April 19 and April 26, 1974.[7] The reporters were subpoenaed to dis-

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[7] The District Court was also concerned about this leak of information (4/9 Tr. 4):

> "Well, I became aware of this for other reasons, primarily because it's been the insistence of the judges of this district that that type of publicity prior to indictment not get out. In other words, I think the record will show that the judges of this district take an exceeding dim view of that type of thing going on, primarily because we believe that the Grand Jury system should be inviolate and not subject to leaks and publicity. . . ."

cover the sources of their information, but each refused to answer on the ground of an alleged First Amendment privilege. The Court sustained their objections and refused to order them to reveal the sources of their information (4/19 Tr. 8-16; 4/26 Tr. 6-16). The Court of Appeals affirmed in footnote 4.

The Courts below disregarded this Court's ruling in *Branzburg v. Hayes*, 408 U.S. 632 (1972). Although *Branzburg* related to a grand jury subpoena, we submit that there is no distinction for a witness subpoenaed to an open court hearing for the purpose of eliciting relevant information as to sources of information and leaks from the grand jury. This Court recognized that a number of cases "have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or *at trial*, pursuant to a subpoena, and give what information he possesses." (Emphasis supplied.) This Court pointed out that some states have provided a statutory privilege to newsmen, but the majority have not done so "and none has been provided by federal statute. Until now the only testimonal privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." The Court saw nothing wrong in "insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."

On the basis of *Branzburg*, the Courts below should have been interested in determining the source of leaks from the grand jury.[8] Such further action, including dismissal of the indictment,

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[8] The suggestion in footnote 4 of the Court of Appeals opinion that petitioner was not entitled to relief because there was no showing of prejudice begs the issue. In the first place, how could petitioner show prejudice without knowing the entire background? Had the

could then have been taken as might have been warranted by the evidence developed from the reporters. The lower Courts' disregard of *Branzburg* should be corrected by this Court.

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The publicity which was generated during the trial was prejudicial to petitioner. Publicity which affects or which may possibly have an effect upon the fairness of a trial constitutes a deprivation of due process of law. *Estes v. Texas*, 381 U.S. 532 (1965), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Irvin v. Dowd*, 366 U.S. 717 (1961), *Chapman v. California*, 386 U.S. 18, 43-44 (1967), (Stewart, J., concurring.) Whenever it appears that prejudicial matter has been publicized in the news media, it is presumed that it has come to the attention of the jury, and that the defendant has been prejudiced; the trial cannot proceed unless the Court is satisfied to the contrary. *Mares v. United States*, 383 F. 2d 805, 808-809 (10th Cir. 1967), *Pamplin v. Mason*, 364 F. 2d 1 (5th Cir. 1966), *Silverthorne v. United States*, 400 F. 2d 627, 644 (9th Cir. 1968).

Here the trial atmosphere was saturated with the news media and reporters' intrusions.[9] Prejudicial publicity occurred on the eve of the trial—see Motion for Transfer of Cause filed July 26, 1974 (R. 145-146). Frequently during the trial, petitioner complained and the Court recognized the impositions of the press, not only by what was printed (Tr. 564, 604, 787) but by the hovering of reporters in the court room and around counsel

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testimony been compelled, we believe prejudice could have been developed from a showing of government leaks. Finally, in matters of publicity, this Court has often said that prejudice is presumed. See *Chapman v. California*, 386 U.S. 18, 43-44 (Stewart, J., concurring), and cases therein cited.

[9] We are submitting with this brief a package of copies of most of the newspaper articles which appeared in the local press while the trial before the unsequestered jury was being conducted. Radio and television coverage was equally pervasive.

tables during recesses (Tr. 543, 669, 1194), in the corridors and at the entrances to the court room; flashbulbs were popping and television lights were glaring (Tr. 897, 1198, 1472, 1486). The trial Court acknowledged that there were "glaring inaccuracies" in the papers (Tr. 562), referred to "these news hounds running around here" (Alsop Tr. 174), and after commenting to the jury about "a lot of photographers around in the halls," finally late in the trial, after the damage had been done, ordered the photographers and news and TV cameramen removed from around the jury room (Null Tr. 25).

The opinion of the Court of Appeals attempts to create the impression that the trial judge took adequate protective measures, but a reading of the entire transcript can lead only to the conclusion that such protective efforts as were made were too little and too late. The damage had already been done. It is true that on several occasions the Court questioned the jurors as to their exposure to the publicity, but we believe that the perfunctory questioning and routine admonitions to the jury could not undo the prejudice which occurred. Even the prosecutor acknowledged that the jurors, being "only human", would be affected by the publicity (Tr. 565). Compare *United States v. Bear Runner*, 502 F. 2d 908 (8th Cir. 1974).

The Court of Appeals reliance on *Murphy v. Florida*, — U.S. —, 95 S. Ct. 2031 (1975), is misplaced. The analysis in *Murphy* of prior decisions of this Court requires a reversal here of this federal trial—compare the concurrence of Mr. Chief Justice Burger in *Murphy*. The constant presence of the media pervaded the trial to create a Sam Sheppard and Billy Sol Estes atmosphere. Petitioner could not have had a fair trial under these circumstances.

Because the prejudicial publicity denied petitioner a fair trial and because of the conflicts with decisions of this Court, we respectfully suggest that certiorari should be granted as to this Question.

VII

Excessive Sentence.

Petitioner was convicted of seven counts of mail fraud violations (18 U.S.C. § 1341), four counts of wire fraud violations (18 U.S.C. § 1343), and one count of conspiracy (18 U.S.C. § 371). Each count carried a maximum of five years imprisonment. By a complicated, unexplained[10] and apparently haphazard method of concurrent and consecutive sentences of five years on each count, the District Court sentenced petitioner to a total of 45 years imprisonment (Tr. 2230-2234). See Appendix D.

Petitioner was charged with a series of interrelated counts with a five year maximum. This was not similar to the traditional mail fraud case with a mailing to each *separate victim* being the subject of a *separate count*—a legitimate basis for the oft-quoted rule that each separate mailing may be the subject of a separate count. Nor was petitioner charged with murder—there was no proof that he caused the murder of Null, and in fact, as the trial commenced, the prosecutor admitted that there was no evidence petitioner "held the gun or fired the bullet" (Tr. 19).

The government's method of multiple substantive counts arising out of one series of transactions was an important form of pleading to facilitate a sentence in excess of the maximum prescribed for the substantive offense. Cf. *United States v. Gallington*, 488 F. 2d 637, 640 (8th Cir. 1973). Counts 1 and 2 each pertained to Prudential, Counts 3, 4, 5 and 6 to New England, Counts 7, 8, 9 and 10 to Lloyds, and Count 11 was a separate interstate telephone call; Count 12 then repeated all the

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[10] The sentencing judge gave no explanation at the time of sentencing for the excessive sentences. The presentence investigation report was not made available to the defense, despite a request therefor (Tr. 2226).

substantive counts in the conspiracy charge (R. 1-17). If petitioner was guilty of anything (which of course we deny), it was of one scheme revolving around the death of Null; it was improper to split the alleged offense into numerous potential five-year sentences. Petitioner's motion to require the government to elect should have been sustained (R. 27).

In a recent mail fraud case, the Tenth Circuit remanded the case for reconsideration of consecutive sentences, even though each separate sentence was within the statutory maximum. *United States v. Mackay*, 491 F. 2d 616 (10th Cir. 1974), cert. denied, 416 U.S. 972 (1974). See also *United States v. Canty*, 469 F. 2d 114 (D.C. Cir. 1972), where the Court considered "the allowable unit of prosecution", and held that the robbery of each teller in a bank could not be separately charged under bank robbery statutes because there was just one bank robbery. Similarly, here the allowable unit of prosecution necessarily had to be the scheme to obtain insurance and cause the death of Null, not each individual letter or telephone call. As said in the *Canty* case (l.c. 126-127):

> "Even assuming that the intent of the statute in this regard is not perfectly clear, the Supreme Court has held that, unless a statutory intent to permit multiple punishments is stated 'clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.' Bell v. United States, 349 U.S. 81, 84, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). See also Heflin v. United States, 358 U.S. 415, 419-420, 79 S.Ct. 451, 3 L.Ed. 2d 407 (1959); Ladner v. United States, 358 U.S. 169, 177-178, 79 S.Ct. 209, 3 L.Ed. 199 (1958); United States v. Universal C.I.T. Corp. [344 U.S. 218, 221, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952)]."

See also *United States v. Fleming*, 504 F. 2d 1045 (7th Cir. 1974).

It was improper to charge, convict and sentence petitioner separately on each count. If he was guilty of an offense, it was one continuing offense. For the government to split it into separate segments approaches the point of double jeopardy prohibited by the Fifth Amendment to the Constitution of the United States. The error was further compounded by the imposition of consecutive sentences. See *Prince v. United States*, 352 U.S. 322 (1957), *Heflin v. United States*, 358 U.S. 415 (1959), *United States v. Chester*, 407 F. 2d 53, 55 (3rd Cir. 1969), *United States v. Welty*, 426 F. 2d 615 (3rd Cir. 1970), and *Moore v. United States*, 432 F. 2d 730, 740 (3rd Cir. 1970).

Numerous cases have rejected attempts at multiple count prosecution. In *Braverman v. United States*, 317 U.S. 49 (1942), there were seven conspiracy counts, but this Court held that only one penalty could be imposed. In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), there were multiple counts for violation of the Fair Labor Standards Act. This Court said (l.c. 224) that the offense made punishable under the act is a course of conduct, and disapproved multiple counts. In the leading case of *Bell v. United States*, 349 U.S. 81, 83-84 (1955), a two-count Mann Act prosection for transportation of two women on the same trip, this Court decided that a clear congressional intent must be evident before multiple prosecutions may be sanctioned. See also *Gebhard v. United States*, 442 F. 2d 281, 289-290 (9th Cir. 1970), and *Yates v. United States*, 355 U.S. 66 (1957), where this Court held that there could be only one contempt for numerous refusals to answer separate questions on two days. Cf. American Bar Association, Standards of Criminal Justice Relating to Sentencing Alternatives and Procedures, § 3.4.

We believe the opinion of the Court of Appeals is in conflict with those of other circuits and of this Court, as well as the

thinking expressed by the ABA Standards. Because of such conflicts, we respectfully suggest that certiorari should be granted as to this Question.

CONCLUSION

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

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